

PD-0880-16

IN THE COURT OF CRIMINAL APPEALS

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ABEL ACOSTA, CLERK

OF THE STATE OF TEXAS

RONALD EDGAR LEE, JR.,

Appellant,

V.

STATE OF TEXAS,

Appellee.

On Appeal from the Court of Appeals, Eleventh Judicial
District, Eastland, Texas

Cause Number 11-14-00198-CR

The 104th District Court of Taylor County, Texas

Honorable Lee Hamilton, Presiding Judge

Trial Court Cause Number 19309-B

STATE'S BRIEF ON THE MERITS

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THE STATE REQUESTS ORAL ARGUMENT

RONALD EDGAR LEE JR., APPELLANT

V.

STATE OF TEXAS, APPELLEE

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Appellee: State of Texas

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STATE'S BRIEF ON THE MERITS

TO THE HONORABLE COURT OF APPEALS:

Now comes the State of Texas, by and through the undersigned Assistant Criminal District Attorney and submits this Brief on the Merits pursuant to Tex. R. App. Proc. 70.2.

STATEMENT REGARDING ORAL ARGUMENT

Appellant did not request oral argument in his petition for discretionary review, and oral argument was not granted. However, appellant requested oral argument in his brief on the merits, stating that

he believed that it would help to clarify the issues before the Court. The State agrees. This case is one of first impression regarding the application of the territorial jurisdiction statute, Texas Penal Code § 1.04 (a)(1), to the offense of continuous sexual abuse of a child, Texas Penal Code § 21.02. Specifically, the question is whether Texas can exercise territorial jurisdiction over the acts of appellant in another state when exactly two acts of sexual abuse are alleged, one within and one outside of the state. Given the novel question presented, the State believes that oral argument would be helpful to the Court.

STATEMENT OF THE CASE

Appellant was convicted of continuous sexual abuse of a child, Tex. Penal Code Ann. § 21.02 (West 2014), and sentenced to life in prison. On appeal, appellant argued that the evidence was insufficient to show that he committed two or more acts of sexual abuse in Taylor County as alleged in the indictment because one of the two alleged acts occurred in New Jersey, and that the evidence was insufficient to prove that he committed two or more acts of sexual abuse because the State of Texas did not have territorial jurisdiction over appellant's acts in New Jersey. The Eastland Court of Appeals affirmed the judgment of the trial court.

STATEMENT OF PROCEDURAL HISTORY

Ronald Edgar Lee, Jr., appellant, was charged with one count of continuous sexual abuse of a child and one count of aggravated sexual assault of a child. (CR1: 5) (RR3: 103-104) Appellant entered a not guilty plea. (CR1: 87-89) (RR3: 104) Appellant was tried before a jury and convicted of continuous sexual abuse of a child as alleged in the indictment on June 26, 2014. (CR1: 33, 52) (RR6: 36) On June 27, 2014, the jury assessed punishment of confinement in the Texas Department of Criminal Justice Institutional Division for life. (CR1: 39, 53-54)(RR6: 36) Appellant filed a notice of appeal. (CR1: 55) Appellant further filed a motion for new trial, which was set for a hearing on August 21, 2014. (CR1: 55, 60) The motion for new trial was denied on August 28, 2014. (CR1: 53) On June 30, 2016, the Eastland Court of Appeals issued its opinion affirming the judgment and conviction. *Lee v. State*, 497 S.W.3d 591 (Tex. App.—Eastland 2016, pet. granted). Appellant filed a motion for rehearing, which was denied on September 15, 2016. Appellant's petition for discretionary review was granted by this Court on January 11, 2017 and appellant's brief on the merits was filed February 10, 2017.

RESPONSE TO ISSUE PRESENTED

- 1. The evidence is legally sufficient to show that appellant was guilty of Continuous Sexual Abuse of a Child; Texas Penal Code § 1.04 (a)(1) states that jurisdiction is proper when any element of a crime occurs within the State.**

STATEMENT OF FACTS

In 2012, April Gonzales discovered her then 10 year old daughter PSUEJNJ (a pseudonym) looking at videos on YouTube with graphic sexual contact. (RR3: 120) When she confronted her daughter as to why she would be looking at these videos, her daughter made an outcry of sexual abuse. (RR3: 121) She took her daughter to a hospital, where a SANE exam was performed. (RR3: 121-122) The hospital notified the Abilene Police Department. (RR3: 122) Following the report, Detective Eric Vickers of the Abilene Police Department's Special Victims Unit interviewed appellant, who is PSUEJNJ's stepfather. (RR3: 115, 131) This interview was recorded and entered into evidence at trial as State's Exhibit 1. (RR3: 131-133) In the interview appellant admitted to having sex with PSUEJNJ, saying that it only happened one time. (RR4: 12-13) Detective Vickers said appellant's statement that it happened when the

child's mother was away at the doctor corroborated the child's story. (RR4: 13) At trial, appellant denied ever having had sex with PSUEJNJ and stated that during his interview with Detective Vickers that he "had no other choice but to tell him what he wanted to hear." (RR4: 83, 89)

PSUEJNJ testified at trial. She testified that while they were living in New Jersey that appellant penetrated her with his male sexual organ while her mother was out of town. (RR4: 36) She stated this was in June of 2012. (RR4: 29) After this the family moved to Abilene, Texas. (RR4: 29) PSUEJNJ testified that what happened in New Jersey happened again in Abilene. (RR4: 52) Appellant testified that the time he was left alone with the child in New Jersey was in June of 2012 and the time that he was left alone with the child in Texas was October 2012. (RR4: 95) PSUEJNJ testified at trial that the two acts of sexual abuse in New Jersey and in Texas were the only two occurrences. (RR4: 49-50)

On appeal, appellant requested either a remand to the trial court or a reformation of the sentence to reflect a single conviction, arguing that because one of the two acts of sexual abuse occurred in New Jersey that the evidence was insufficient to show that he committed two or more acts of sexual abuse in Taylor County as alleged in the indictment. Appellant

further argued that the evidence is insufficient to prove that he committed continuous sexual abuse of a child because the State of Texas did not have territorial jurisdiction over the act of sexual abuse in New Jersey. Appellant's ground for review in this court arises from his second argument.

SUMMARY OF THE ARGUMENT

Appellant argues that the evidence at trial was legally insufficient to prove that he committed either sexual assault or aggravated sexual assault under Tex. Penal Code Ann. §§ 22.011 or 22.021 (West 2014) two or more times because the State did not have territorial jurisdiction over the acts of appellant in New Jersey. Appellant was not charged with sexual assault or aggravated sexual assault in New Jersey; rather, appellant was charged with continuous sexual abuse of a child under Tex. Penal Code Ann. § 21.02 (West 2014) Because one prohibited conduct element of that offense occurred in the state of Texas, territorial jurisdiction is established under Tex. Penal Code Ann. § 1.04 (a)(1) (West 2014).

ARGUMENT AND AUTHORITIES

The Appellant states that the evidence is insufficient because there has been no showing of two or more acts of sexual abuse in Texas, and that Texas has no jurisdiction over the conduct of Appellant which occurred in New Jersey, stating that there is no territorial jurisdiction under Tex. Penal Code Ann. § 1.04 (West 2014). If the Appellant were charged with one count of Aggravated Sexual Assault in Texas and a second separate count in New Jersey, there would be no territorial jurisdiction under Tex. Penal Code Ann. § 1.04 (West 2014) for a freestanding criminal charge in New Jersey. However, the Appellant was convicted of the single crime of continuous sexual abuse of a child. Under Tex. Penal Code Ann. § 1.04 (a)(1) (West 2014), the state has territorial jurisdiction over the offense so long as one element of that crime occurs within Texas.

1. Continuous sexual abuse of a child is a single offense

A person commits the offense of continuous sexual abuse against a child if: “(1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and (2) at the time of the commission of each of the acts of sexual abuse, the

actor is 17 years of age or older and the victim is a child younger than 14 years of age.” Tex. Penal Code Ann. § 21.02 (West 2014). Juror unanimity as to each individual act is specifically not required by statute: “[i]f a jury is the trier of fact, members of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. The jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse.” Tex. Penal Code Ann. § 21.02 (d) (West 2014). Texas courts have recognized that this creates a single offense rather than an aggregate of separate offenses.

In the case of *Meraz v. State*, 415 S.W.3d 502 (Tex. App. – San Antonio 2013, pet ref’d), the defendant argued that there was jury charge error because the charge did not instruct the jury that it could not consider evidence of sexual abuse of children that occurred in counties outside of Tarrant County, and that the evidence was legally insufficient to prove that all of the elements of the offense occurred within Tarrant County. The court rejected this argument, noting that:

However, appellant points us to no authority requiring that all of the predicate acts of sexual abuse that constitute the

offense of continuous sexual abuse of a young child or children be committed in the same county. Section 21.02 of the Penal Code creates a single offense. *Render v. State*, 316 S.W.3d 846, 857 (Tex. App.—Dallas 2010, pet. ref'd). The continuous sexual abuse statute allows the State to seek “one conviction for a ‘series’ of acts of sexual abuse with evidence that, during the relevant time period, appellant committed two or more different acts that section 21.02 defines as means of committing a single criminal offense and not as two or more separate criminal offenses.” *Id.* The acts may be committed against more than one child victim, and the jury is “not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed.” Tex. Penal Code Ann. § 21.02(d). (West Supp. 2012). The location or place where the sexual abuse was committed is not an element of the offense. *See id.* § 21.02. And the legislature did not require that all elements of the offense be committed in one county. *See id.*; *State v. Weaver*, 982 S.W.2d 892, 893-94 (Tex. Crim. App. 1998) (aggravated theft statute created one offense consisting of multiple acts of theft, without regard to whether individual acts occurred in multiple counties, and venue is proper in any county in which an individual theft or any element thereof occurred).

Meraz at 505-06. The court further noted that the indictment may properly allege the offense was committed in the county of prosecution even if the proof shows the offense was committed elsewhere, so long as the county of prosecution has venue. *Meraz* at 506, fn. 1; *See* Tex. Code Crim. Proc. Ann. art. 21.06 (West 2014); *Rushing v. State*, 546 S.W.2d 610, 611 (Tex. Crim. App. 1977). Venue is proper in a case regarding an

offense under Title 5 of the Penal Code, involving a victim younger than 18 years of age in a county in which an element of the offense was committed, in which the defendant is apprehended, in which the victim resides, or in which the defendant resides. Tex. Code Crim. Proc. Ann. art. 13.075 (West 2014). Similarly, the *Render* case cited by *Meraz* dealt with a defendant's argument that the offense of continuous sexual abuse was an aggregation of individual crimes of sexual abuse, and that juror unanimity was accordingly constitutionally required as to each instance of sexual abuse. The court rejected this argument, noting that "the State sought one conviction for a 'series' of acts of sexual abuse with evidence that, during the relevant time period, appellant committed two or more different acts that section 21.02 defines as means of committing a single criminal offense and not as two or more separate criminal offenses." *Id.* at 857.

This is in keeping with the purpose of the continuous sexual abuse statute. Prior to the passage of section 21.02 in 2007, Judge Cochran noted the need for such a law in her concurrence in *Dixon v. State*, 201 S.W.3d 731 (Tex. Crim. App. 2006). Judge Cochran noted that the then-current state of Texas law did not easily accommodate the prosecution

of ongoing acts of sexual abuse of young children because penal statutes are intended to prosecute offenders who commit one discreet act at one discrete moment in time. *Id.* at 736-37. She noted that “[o]ur state constitution requires the jurors to make a unanimous decision on the occurrence of one specific criminal act... the law focuses the advocates, judge, and jurors on whether the person charged is guilty of this one, very specific criminal act that he is charged with having committed,” which did not fit the common scenario of an ongoing crime involving an abusive sexual relationship with a child. *Id.* at 737. She proposed making the abusive relationship itself the criminal act: “[p]erhaps the Texas Legislature can address this conundrum and consider enacting a new penal statute that focuses upon a continuing course of conduct crime - a sexually abusive relationship that is marked by a pattern or course of conduct of various sexual acts.” *Id.* The enactment of section 21.02 in 2007 addressed exactly the problems that Judge Cochran identified. By making the ongoing course of conduct into a single crime, a child who had been abused hundreds of times could testify as to the ongoing acts of abuse, and a jury could find the defendant guilty of the crime of continuous sexual abuse if they all agreed that any two of the

acts occurred. The case law that has followed has recognized the unitary nature of the offense.

2. Territorial jurisdiction is proper so long as one prohibited conduct element of the offense occurs within the state

Appellant further states that there is no territorial jurisdiction under Tex. Penal Code Ann. § 1.04 (a) (West 2014) for the Aggravated Sexual Assault described by PSEUJNJ in New Jersey. That section of the Penal Code states:

(a) This state has jurisdiction over an offense that a person commits by his own conduct or the conduct of another for which he is criminally responsible if:

(1) either the conduct or a result that is an element of the offense occurs inside this state;

(2) the conduct outside this state constitutes an attempt to commit an offense inside this state;

(3) the conduct outside this state constitutes a conspiracy to commit an offense inside this state, and an act in furtherance of the conspiracy occurs inside this state; or

(4) the conduct inside this state constitutes an attempt, solicitation, or conspiracy to commit, or establishes criminal responsibility for the commission of, an offense in another jurisdiction that is also an offense under the laws of this state.

Tex. Penal Code Ann. § 1.04 (a) (West 2014). Under § 1.04 (a)(1), territorial jurisdiction is established when any part of the actus reus, or

prohibited conduct, of an offense occurs inside the state. This section of the Penal Code was discussed in the case of *Rodriguez v. State*, 146 S.W.3d 674 (Tex. Crim. App. 2004). *Rodriguez* involved a defendant who participated in a conspiracy to kidnap a potential witness in a pending drug trial in federal court. *Id.* at 675. The kidnapped witness was taken to Mexico, where he was killed. *Id.* The Thirteenth Court of Appeals initially held that, because the capital murder statute explicitly directs the reader to the murder statute, an element of the underlying murder must take place within the state. *Rodriguez v. State*, No. 13-00-00771-CR, 2003 Tex. App. LEXIS 6962 (Tex. App. — Corpus Christi, August 14, 2003). However, the Court of Criminal appeals reversed this ruling, holding that phrase “that is an element of the offense” applies to both “conduct” and “result.” *Rodriguez*, 146 S.W.3d at 675-76. Like Penal Code § 21.02, Tex. Penal Code Ann. § 19.03 (West 2014) directs the reader to other offenses in the Penal Code in enumerating the elements of capital murder. Penal Code § 19.03 (a)(1) and (3) state that “[a] person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and...the person intentionally commits the murder in the course of committing or attempting to commit

kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat under Section 22.07(a)(1), (3), (4), (5), or (6).” Tex. Penal Code § 19.03 (a)(1), (3) (West 2014). However, under that statute those are elements of the offense of capital murder, and do not constitute convictions for the offenses themselves. In *Rodriguez*, the victim was kidnapped in Texas but all of the elements of the murder took place in Mexico. *Rodriguez*, 146 S.W.3d at 677. Because the kidnapping was part of the actus reus of capital murder, territorial jurisdiction was established under Penal Code § 1.04 (a)(1). *Id.* at 676-77.

The Court’s ruling in *Rodriguez* applies directly in the instant case. Texas Penal Code § 21.02 creates a single offense. *Meraz*, 415 S.W.3d at 505 (citing *Render v. State*, 316 S.W.3d 846, 857 (Tex. App.—Dallas 2010, pet. ref’d)). The continuous sexual abuse statute allows the State to seek “one conviction for a ‘series’ of acts of sexual abuse with evidence that, during the relevant time period, appellant committed two or more different acts that § 21.02 defines as means of committing a single criminal offense and not as two or more separate criminal offenses.” *Meraz* at 505 (quoting *Render* at 857). The elements of that

single offense are the commission of two or more enumerated sex offenses against a child, committed 30 days or more apart. Tex. Penal Code Ann. § 21.02 (West 2012). Aggravated sexual assault under Tex. Penal Code Ann. § 22.021 (West 2014) is among those enumerated offenses and serves as an element to the offense of continuous sexual abuse of a child. Tex. Penal Code Ann. § 21.02(c)(6) (West Supp. 2012). Taken in a light most favorable to the verdict, the evidence showed through the testimony of PSUEJNJ that conduct which met the criteria for aggravated sexual assault occurred twice over a period of at least 30 days, once in Taylor County, Texas and once in New Jersey. (RR4: 36, 52, 95) Because part of the prohibited conduct occurred within the State, territorial jurisdiction is established under Texas Penal Code § 1.04 (a).

A similar result was reached by the 5th Court of Appeals in *Bayless v. State*, No. 05-99-01978-CR, 2003 Tex. App. LEXIS 3852, 2003 WL 21006915 (Tex. App. – Dallas May 6, 2003, no pet.), which the Eastland Court relied on in its opinion. In *Bayless*, the defendant murdered two victims, one in Texas and one in Kansas. *Bayless* at [*3]. The State alleged both murders in the indictment and charged the

defendant with capital murder under Texas Penal Code § 19.03(a)(7)(B) due to her having murdered more than one person during different criminal transactions but pursuant to the same scheme or course of conduct. *Id.* On appeal, the defendant challenged the trial court's denial of her motion to quash the indictment on the grounds that the grand jury had no authority to charge her for a murder which occurred in Kansas. *Id.* The Court of Appeals found that the indictment charged the defendant with the sole crime of capital murder, and because one element of that offense occurred in Texas, territorial jurisdiction over the whole offense was established under Texas Penal Code § 1.04 (a)(1). *Id.*

Appellant argues in his brief that it appears that the defendant in *Bayless* committed the first murder in Texas and a subsequent murder in Kansas, implying that the commission of the initial murder in Texas imparted jurisdiction over the second murder as occurring within the same scheme or course of conduct. *See appellant's brief at 24.* The State would argue that the order in which the murders are committed is not dispositive; territorial jurisdiction depends on whether any element of the offense occurs within the state, regardless of the order in which they

are committed. Moreover, although it is not entirely clear from a reading of the *Bayless* opinion, the first murder did in fact take place in Kansas and the second murder in Texas. The defendant committed the murders with several codefendants, one of whom was Kevin Scott Varga; Varga appealed to this Court in *Varga v. State*, No. 73990, 2003 WL 21466926 (Tex. Crim. App. June 25, 2003) (mem. op.). That opinion contains a more thorough recitation of the underlying facts, and makes clear that the defendants murdered the first victim in Wichita, Kansas, then drove the victim's stolen car to Greenville, Texas, where they committed the second murder. *Varga* at *1-2.

CONCLUSION

The crime of continuous sexual abuse of a child is a single, unitary offense, and the commission of any part of that offense inside the state confers territorial jurisdiction under Texas Penal Code § 1.04 (a)(1). Appellant committed acts meeting the statutory definition of sexual abuse in the State of New Jersey and the State of Texas over a period of thirty days or more in duration in violation of Texas Penal Code § 21.02 and is guilty of the crime of continuous sexual abuse of a child. The

opinion of the Eastland Court of Appeals is correct and should be affirmed.

PRAYER FOR RELIEF

The State respectfully requests that this Court affirm the ruling of the Eastland Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on March 15, 2017, a copy of the foregoing instrument has been served via mail, email or e-filing to the following:

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CERTIFICATE OF COMPLIANCE

This is to certify that the sections covered by Texas Rule of Appellate Procedure 9.4(i)(1) contain 3569 words in 14 point type, excepting footnotes which are 12 point type. The total word count is 4413.

s/ Britt Lindsey
BRITT LINDSEY